80-315

No. .....

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1980

SOUTHERN PACIFIC COMPANY
(PACIFIC LINES),
PETITIONER,

v.

CLARK B. RICHINS, BERNIE L. STARK,
RALPH G. VICTOR, PAUL BENNETT, EARL F.
DUSTIN, MIKE CLEM MERRILL, and
STEVEN R. HYMUS

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a federal district court has jurisdiction over an action brought by railroad employees against the railroad for layoffs allegedly in violation of a collective bargaining agreement and against their union for an alleged breach of the duty of fair representation by failure to protest the layoffs in accordance with established grievance procedures.

PARTIES

In addition to the parties listed in the caption of this petition, the Brotherhood of Railway Carmen of the United States and Canada; System Federation No. 114, Railway Employees' Department, AFL-CIO; Lodge #635; and, DOES 1 through 50, inclusive, were parties in the court of appeals (respondents).

TABLE OF CONTENTS

Opinions Below 1
Jurisdiction 2
Statutes Involved 2
Statement of the Case 2
Reasons for Granting the Petition 4
Argument 4
Conclusion 15
Appendix A 1a
Appendix B 8a
Appendix C 16a

TABLE OF AUTHORITIES

Cases: *Pages*

Andrews v. Louisville & Nashville Railroad Company, 406 U.S. 320 ..... 4, 7
Czosek v. O'Mara, 397 U.S. 25 10
Glover v. St. Louis - San Francisco Railway Co., 393 U.S. 324 ..... 6, 10
Goclowski v. Penn Central Transportation Co., 571 F.2d 747 ..... 4, 5, 12
Harrison v. United Transportation Union, 530 F.2d 558 ..... 4, 7, 14
Price v. Southern Pacific Transportation Co., 586 F.2d 750 13
Schum v. South Buffalo Railway Co., 496 F.2d 328 13
Union Pacific Railroad Co. v. Sheehan, 439 U.S. 89 4, 7

Statutes:

Act of June 21, 1934, Ch. 691, § 3, 48 Stat. 1189, amending Act of May 20, 1926, Ch. 347, § 3, 44 Stat. 578, 45 U.S.C. § 153 First. (i) 2, 5, 8

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Southern Pacific Transportation Company, a corporation referred to as Southern Pacific Company, (Pacific Lines) in the judgment of the court of appeals, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-7a) is reported at 620 F.2d 761. The opinion of the district court (App. B, *infra*, 8a-15a) is unreported.

JURISDICTION

The judgment of the court of appeals (App. A, *infra,* 1a) was entered on April 28, 1980. On July 15, 1980, Mr. Justice White extended the time for filing a writ of certiorari to August 26, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 3 of the Act of June 21, 1934, ch. 691, 48 Stat. 1189, amending the Act of May 20, 1926, ch. 347, section 3, 44 Stat. 578, 45 U.S.C. § 153 First. (i), provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on June 21, 1934, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

STATEMENT OF THE CASE

Plaintiffs are employees and former employees of defendant Southern Pacific, and members of the defendant Union, who were laid off by the Railroad pursuant to a reduction in force. Plaintiffs filed the Complaint in this action in April, 1977, claiming that such

layoffs were in violation of a collective bargaining agreement (and addenda thereto) then in force between the Railroad and the Union. They further claim that the Union defendant breached its duty of fair representation in failing to protest plaintiffs' layoffs pursuant to established grievance procedures. The Complaint does not allege that the Railroad was implicated in the alleged unfair representation of the plaintiffs by the Union, nor that the Railroad and the Union conspired to violate plaintiffs' rights.

The relief sought by plaintiffs includes reinstatement to their former positions with seniority and damages for losses suffered during the time they were laid off by the defendant Railroad. Plaintiffs also seek punitive damages against the Union. Jurisdiction of the action in the district court was invoked by the plaintiffs, in the first instance, under 28 U.S.C. § 1337 and under 28 U.S.C. § 1331 as an action arising under the Railway Labor Act, 45 U.S.C. §§ 151 *et seq.*

Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction upon the grounds that plaintiffs' sole remedy lay in a proceeding before the National Railroad Adjustment Board and that they had failed to exhaust contractual and internal union grievance procedures. The District Court dismissed the Complaint "without prejudice, in its entirety, for lack of jurisdiction, on the grounds that plaintiffs have failed to exhaust their remedies before the National Railroad Adjustment Board". (App. B, *infra,* 8a) The court of appeals reversed, holding that the district court had jurisdiction of the action against both the Railroad and the Union.

After dismissal by the district court, plaintiffs initiated a proceeding before the National Railroad Adjustment Board that is pending.

REASONS FOR GRANTING THE PETITION

1. The court of appeals has rendered a decision in conflict with the decisions of other federal courts of appeals on the same matter, specifically the Third Circuit, *Goclowski v. Penn Central Transportation Company*, 571 F.2d 747 (3d Cir. 1977); and the Fourth Circuit, *Harrison v. United Transportation Union*, 530 F.2d 558 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976).

2. The court of appeals has decided a federal question in a way that is in conflict with applicable decisions of this Court, specifically *Andrews v. Louisville & Nashville Railroad Company*, 406 U.S. 320 (1972), and *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978).

3. To the extent that the decisions of this Court and the decision of the court of appeals are not in conflict, then the court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

ARGUMENT

POINT 1. *Conflict Among The Federal Courts Of Appeals.*

The court of appeals has decided that an action brought by railroad employees against the railroad for violation of the collective bargaining agreement between the railroad and the employees' union and against their union for breach of the duty of fair representation is within the jurisdiction of a federal district court. The court of ap-

peals held that in such a "hybrid" case, the National Railroad Adjustment Board does not have exclusive jurisdiction of the employees' claim against the railroad pursuant to the Railway Labor Act, 45 U.S.C. § 153 First (i). (620 F.2d at 763; App. A, *infra*, 7a.)

This holding is directly contrary to the decision of the court of appeals in *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747 (3d Cir. 1977), in which the court considered the claim of railroad employees that a particular agreement between the railroad and their union was an unauthorized extension of existing collective bargaining agreements as to seniority. The district court in that case had held that the Adjustment Board had primary and exclusive jurisdiction over such a claim. *Id.* at 755. The court of appeals affirmed:

> We agree with the district court that this part of the invalidation claim is for the Board. No doubt may be entertained that this claim requires close examination of the pertinent collective bargaining agreements between the Union and the Railroad. We defer to the expertise of the Board in construing railroad labor contracts. [Citations omitted.] That the Union is joined as a defendant does not alter the basis of the claim which primarily involves contractual interpretation.

Id.

Having so held, the court pared off the claim that was based upon violation of the collective bargaining agreement for resolution by the Adjustment Board and remanded other claims asserted against both the union and the railroad, not involving interpretation of the collective bargaining agreement, to the district court for further proceedings. *Id.* at 761 and n. 18. Thus, the Third Cir-

cuit's opinion clearly holds that a claim against a railroad premised upon a violation of a collective bargaining agreement is not within the jurisdiction of a federal district court. And this is so whether or not the employees' union is joined as a defendant, and whether or not other claims are asserted against the union and the railroad not involving construction of the collective bargaining agreement.

The decision of the court of appeals herein clearly conflicts with the *Goclowski* decision. No claims are asserted against the railroad in this action other than that it violated the existing collective bargaining agreement in laying off the plaintiffs, so no distinction can be made upon the facts of the cases. In this action, plaintiffs do not allege that the railroad was implicated in the unfair representation by the union, nor that it colluded or conspired with the union to undermine the rights of plaintiffs, so as to be within the rationale of other cases requiring the railroad to be a necessary party to such claims against the union.[1] *E.g., Glover v. St. Louis - San Francisco Rail-*

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[1]The Tenth Circuit seems to assume the existence of such allegations against the railroad in the present case, as evidenced by the following statements:

> Furthermore, the alleged facts, viewed in a light most favorable to plaintiffs, are consistent with a pattern of collusion between Union and Railroad.

620 F.2d at 762, App. A, *infra*, 5a.

> We note that the complaint here charges *Union officials* with maliciously discriminatory behavior. . . . This is sufficient to create a fair representation claim which may not depend primarily on the terms of the contract. (Citations omitted.)

Id. at 763, App. A, *infra*, 6a-7a (emphasis added). The court of appeals indulges in such analysis notwithstanding the total absence of any allegations of collusion or discrimination involving the railroad.

way Co., 393 U.S. 324 (1969); *Goclowski, supra.* As a result, there is no distinction to be made between the decisions of the Tenth Circuit in this case and the Third Circuit in *Goclowski;* they are in direct conflict.

The same conflict exists with respect to the decision of the court of appeals in *Harrison v. United Transportation Union,* 530 F.2d 558 (4th Cir. 1975), *cert. denied,* 425 U.S. 958 (1976), in which the court stated:

> Grievances founded upon contract claims must be presented to the Adjustment Board, and the only right of action in the district courts is for the enforcement of the awards.

Id. at 563.

Accordingly, a direct conflict exists between the decision of the court of appeals and decisions rendered by the Third and Fourth Circuit Courts of Appeals, which conflict should be resolved by a decision of this Court.

POINT 2. *Conflict With Decisions of This Court.*

The decision of the court of appeals conflicts with the decisions of this Court in *Andrews v. Louisville & Nashville Railroad Company,* 406 U.S. 320 (1972), and *Union Pacific Railroad Co. v. Sheehan,* 439 U.S. 89 (1978). In *Andrews,* the Court squarely held that disputes between a railroad and its employees or former employees as to the interpretation of a collective bargaining

agreement are subject to the mandatory requirement of the Railway Labor Act, 45 U.S.C. § 153 First (i), and that the dispute be submitted to the National Railroad Adjustment Board. 406 U.S. at 324. Such a proceeding was held by the Court to be *the exclusive remedy available to the employee:*

> A party who has litigated an issue before the Adjustment Board on the merits may not relitigate that issue in an independent judicial proceeding. [Citations omitted] He is limited to the judicial review of the Board's proceedings that the Act itself provides. [Citations omitted] In such a case the proceedings afforded by 45 USC § 153 First (i), will be the only remedy available to the aggrieved party.

Id. at 325. The Court's holding in *Andrews* was dramatically underscored by the Court's opinion several years later in *Sheehan,* where the Court reversed a decision by the Tenth Circuit Court of Appeals, which had attempted to reverse an Adjustment Board determination that a claim was barred for failure to comply with time limits prescribed by the applicable collective-bargaining agreement. In so doing, the Court stated:

> A contrary conclusion would ignore the terms, purposes and legislative history of the Railway Labor Act. In enacting this legislation, Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the inter-

> pretation of collective bargaining agreements. See Gunther v San Diego & A. E. R. Co., supra; Union Pacific R. Co. v. Price, supra; Slocum v Delaware, L. & W. R. Co., 339 US 239, 94 L Ed 795, 70 S Ct 577 (1950). The Adjustment Board was created as a tribunal consisting of workers and management to secure the prompt, orderly and final settlement of grievances that arise daily between employees and carriers regarding rates of pay, rules and working conditions. Union Pacific R. Co. v Price, supra, at 611, 3 L Ed 2d 1460, 79 S Ct 1351; Elgin J. & E. R. Co. v Burley, 327 US 661, 664, 90 L Ed 928, 66 S Ct 721 (1946). *Congress considered it essential to keep these so-called "minor" disputes within the Adjustment Board and out of the courts.* Trainmen v Chicago, R. & I. R. Co., 353 US 30, 1 L Ed 2d 622, 77 S Ct 635 (1957).

439 U.S. at 94.

The decision of the court of appeals is directly at odds with the explicit language of these two opinions. It has held that Adjustment Board proceedings are not the exclusive remedy of the employee against the railroad. Instead, the court holds, a federal district court may take jurisdiction of an employee's dispute with the railroad as to the interpretation of a collective-bargaining agreement as well. The purported basis of such a holding is that this is a "hybrid" case not controlled by the *Sheehan* and *Andrews* decisions. (620 F.2d at 762; App. A, *infra*, 4a.) This court-made exception to the holdings of this Court is a distinction without a difference. There is nothing more asserted against the railroad defendant in this case than that it wrongly laid off the plaintiffs in violation of the collective bargaining agreement. The entire controversy

hinges upon interpretation of that agreement, a task committed by statute and by the decisions of this Court exclusively to the National Railroad Adjustment Board.

Accordingly, the decision of the court of appeals is in direct conflict with the decisions of this Court in *Andrews* and *Sheehan*.

POINT 3. *Undecided Question Of Federal Law.*

That the question presented for review by this petition is an important question of federal law affecting interstate commerce and the stability of labor-management relations in a vital industry is thoroughly well-established by this Court's opinion in *Sheehan*:

> In enacting [the Railway Labor Act], Congress endeavored to promote stability in labor-management relations in this important national industry by providing effective and efficient remedies for the resolution of railroad-employee disputes arising out of the interpretation of collective bargaining agreements.

439 U.S. at 94.

a. *Czosek and Glover do not address the issue in this case.* If the court of appeals is correct in its reading of this Court's opinions, then it has decided an important question of federal law that has not been, but should be, decided by this Court. The court of appeals relies upon two pre-*Andrews* cases in reaching its decision: *Czosek v. O'Mara*, 397 U.S. 25 (1970), and *Glover v. St. Louis-San Francisco Railway*, 393 U.S. 324 (1969). Of these decisions, the court of appeals states:

> Although the Supreme Court in *Czosek* did not decide whether 'the employer may *always* be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation,' 397 U.S. at 30, 90 S.Ct. at 773-774 (emphasis added), the Court has explicitly permitted such suits in federal court and denied Board jurisdiction. This is the only resolution of that problem to receive Supreme Court approval. *See Glover v. St. Louis-San Francisco Railway*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969).

620 F.2d at 763; App. A, *infra*, 5a. *Czosek* and *Glover*, however, do not dispose of the instant case. *Czosek* specifically did not address the issue presented herein, as noted by the court of appeals. The Court stated in *Czosek*:

> [W]e have no occasion to consider whether under federal law, which governs in cases like these, the employer may always be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation or whether, as the Court of Appeals held, when there are no allegations tying union and employer together, the union is suable in the District Court for breach of duty but resort must be had to the Adjustment Board for a remedy against the employer.

397 U.S. at 29-30. *Czosek* followed on the heels of *Glover*, and so it cannot be reasoned that *Glover* contained any more of an answer to that question than does *Czosek*. *Glover*, in fact, deals with a specific situation wholly unlike that of the present case. There the Court was confronted with allegations by railroad employees that the

railroad and the union had concertedly engaged in racial discrimination. Such a charge, more in the nature of a tort than a contract claim requiring interpretation of a collective-bargaining agreement, led the Court to hold that the federal district court had jurisdiction over the railroad as well as the union in such a case. 393 U.S. at 329. The instant case doesn't fall within *Glover*, however, there being no allegations of concerted action by the railroad and the union, no racial discrimination alleged, no members of a protected class among the plaintiffs, and no overriding federal constitutional policy to enforce. Whereas interpretation of the collective-bargaining agreement was merely incidental to the determination of the controversy in *Glover*, in this case it is the entire controversy. If the defendants correctly interpreted the agreement, plaintiffs have no claim against either.[2]

Thus, the opinions of this Court upon which the court of appeals relies are not persuasive authority for its decision, and those opinions cannot be said to have resolved the issue presented herein. Moreover, the subsequent decisions of this Court in *Andrews* and *Sheehan* cast doubt

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[2]This distinction was relied upon by the court of appeals in *Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747 (3d Cir. 1977):

> Plaintiffs cite *Glover v. St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 89 S.Ct. 548, 21 L.Ed.2d 519 (1969), for the proposition that a lawsuit filed by employees against both their union and their employer does not fall within the Board's exclusive jurisdiction under the terms of 45 U.S.C. § 153 First (i) (1970) ("disputes between an employee or group of employees and carrier or carriers"). We believe *Glover* is not applicable when the basis of the claim is primarily construction and interpretation of existing collective bargaining agreements.

Id. at 756, n. 13.

upon whatever precedent one might find in *Czosek* and *Glover*.

b. *The court of appeals invites a decision by this court.* The court of appeals read *Czosek* and *Glover* to create "hybrid jurisdiction" in the federal district court. 620 F.2d at 763; App. A, *infra*, 4a-5a. It concluded that *Sheehan* did not repudiate that doctrine, *id.*, and then the court invited a ruling by this Court:

> [A]bsent clearer direction from the Supreme Court, we are unwilling to require bifurcated jurisdiction of hybrid cases.

Id.; App. A, *infra*, 5a-6a. Thus the court of appeals practically requests this Court to decide whether the rules of law announced in *Andrews* and *Sheehan* are absolute or subject to exceptions in the case of actions brought against both railroad and union. The invitation of a Supreme Court ruling by the court of appeals in this case, coupled with the fact that other courts of appeals have reached a result contrary to the decision herein, strongly suggest the need for this Court's resolution of this important question of federal law.

c. *Other courts of appeals have labored with this question.* In *Price v. Southern Pacific Transportation Company*, 586 F.2d 750 (9th Cir. 1978), and *Schum v. South Buffalo Railway Co.*, 496 F.2d 328 (2d Cir. 1974), the Ninth and Second Circuit Courts of Appeals have wrestled with the question of a district court's jurisdiction of claims against the railroad and the union. In *Price*, the court held that a railroad may be joined as a defendant

in an action against the union for breach of the duty of fair representation when the employer railroad is "implicated" in the union's breach of duty. 586 F.2d at 752. The precise issue in the instant case, where no such "implication" is alleged, was specifically not addressed by the court:

> Price's allegations in this case make it unnecessary to decide whether in a case subject to the Railway Labor Act the mere "taint" of the discharge procedure by the union's breach of its duty of fair representation provides a basis for joinder of the employer carrier in the employee's suit against the union.

Id.

Similarly, in *Schum, supra,* the court of appeals held that where a union had misled its member into believing that his grievance was being processed, when it was not, so that his right to appeal to the Adjustment Board was lost because of the union's failure to file a petition in time, an action against the railroad would not be barred by the defense of failure to exhaust administrative remedies. The facts of the plaintiff's reliance and the union's nonfeasance are peculiar to the *Schum* case, but it represents another attempt to judicially establish an exception to the exclusive jurisdiction rule announced in *Andrews.* Of interest is the fact that the court of appeals in *Harrison v. United Transportation Union,* 530 F.2d 558 (4th Cir. 1975), *cert. denied,* 425 U.S. 958 (1976), specifical-

ly rejected the *Schum* opinion and held the union solely responsible for the injury caused by its nonfeasance.[3]

Thus the law on this matter is unsettled among the circuit courts of appeals. To date, however, no court of appeals has gone as far as the Tenth Circuit in the instant case in eroding the precedent of this Court's decisions in *Andrews* and *Sheehan*. Petitioner respectfully submits that this decision is an appropriate case for review by the Court and for the announcement of the rule of law to govern these types of cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

L. RIDD LARSON
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AUGUST 1980

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[3] *Schum*, however, appears to us to be inconsistent with the whole theory and purpose of the Acts construed in *Andrews*. Grievances founded upon contract claims must be presented to the Adjustment Board, and the only right of action in the district courts is for the enforcement of its awards. In fairness, the consequence of the loss of the right of action should not be visited upon the employee, if the loss was not the result of his own conduct. But if the loss results from the deliberately misleading conduct of the union, the union may be held to respond in compensatory damages to him, and there is no reason to stretch the statute to permit the employee's maintenance of an original cause of action against the railroad.
530 F.2d at 563.

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 78-1887

[Filed April 28, 1980]

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, STEVEN R. HYMUS,

Plaintiffs-Appellants,

v.

SOUTHERN PACIFIC COMPANY (PACIFIC LINES); BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES DEPARTMENT, AFL-CIO; LODGE #635, DOES 1 through 50, Inclusive,

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
(D.C. Case No. NC 77-0038)

Robert A. Bush of Taylor, Roth & Grant, Los Angeles, California, for Plaintiffs-Appellants.

L. Ridd Larson of Ray, Quinney & Nebeker, Salt Lake City, Utah, (William F. Adams, Robert S. Bogason and Gary A. Laakso, San Francisco, California, with him on the brief), for Defendant-Appellee Southern Pacific Company.

Thomas A. Woodley (Edward J. Hickey with him on the brief), Mulholland, Hickey, Lyman, McCormick, Fisher & Hickey, Washington, D.C., for Union Defendants-Appellees.

Before McWILLIAMS, BARRETT and McKAY, Circuit Judges.

McKAY, Circuit Judge.

Seven employees or former employees of the Southern Pacific Transportation Company (Railroad) brought this suit against the Railroad and the Brotherhood of Railway Carmen and two of its subordinate organizations (Union). The seven allege that they were demoted and then laid off in violation of the applicable collective bargaining agreement and that the Union breached its duty of fair representation by failing to enforce the agreement. The plaintiffs ask for reinstatement with full seniority, lost wages and benefits, punitive damages, and various costs and fees. The district court dismissed the action against both the Railroad and the Union for lack of jurisdiction, holding that the plaintiffs had not exhausted their administrative remedies before the National Railroad Adjustment Board (Board).[1/] Later, in a separate ruling, the court refused to retain jurisdiction over the matter while administrative remedies were sought. Plaintiffs appeal.

The dispute derives from a 1968 merger of the Rail-

[1/] The parties also filed motions for summary judgment. The district court, however, decided only the jurisdictional issue, and that issue alone is before us on appeal.

road with another railroad company. The merger required a modification of the basic collective bargaining agreement to govern the dovetailing of two seniority rosters. Plaintiffs allege that, during each year from 1972 until 1975, they were demoted and subsequently furloughed from their positions as "Upgraded Carmen Apprentices," while "Upgraded Carmen Helpers," who should have been demoted first under a 1965 Memorandum of Agreement, continued to work without demotion. Plaintiffs further allege that Union officials, many of whom were former employees of the merging company, consistently misled them about their rights and demonstrated a persistent antagonism toward the apprenticeship program. As a result, plaintiffs were prevented from filing a timely claim before the Board. The Railroad and Union counter with the argument that certain employees, including the Upgraded Helpers, were given special protection under the 1968 Reorganization Agreement. Under this view, the Union failed to aid plaintiffs not because of antagonism, but because the plaintiffs' claims lacked merit under the contract.

If this suit had been brought against the Railroad only, we would have no difficulty in determining the proper disposition. The dispute between plaintiffs and the Railroad is clearly a "minor" one—that is, "between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions." 45 U.S.C. § 153 First (i). As the Supreme Court has emphatically told us, "Congress considered it essential to keep these so-called 'minor' disputes within the Adjustment Board and out of the

courts." *Union Pacific Railroad v. Sheehan*, 439 U.S. 89, 94 (1978). *See also Andrews v. Louisville & Nashville Railroad*, 406 U.S. 320, 325 (1972).

Similarly, had plaintiffs brought only the fair representation claim against the Union, our duty would be clear. The Railway Labor Act provides no explicit jurisdiction for the Board to resolve employee-union disputes. In *Czosek v. O'Mara*, 397 U.S. 25 (1970), also a case arising from the dislocations of a merger, the Court left no doubt about the limits of Board jurisdiction:

> And surely it is beyond cavil that a suit against the union for breach of its duty of fair representation is not within the jurisdiction of the National Railroad Adjustment Board or subject to the ordinary rule that administrative remedies should be exhausted before resort to the courts. The claim against the union defendants for the breach of their duty of fair representation is a discrete claim quite apart from the right of individual employees expressly extended to them under the Railway Labor Act to pursue their employer before the Adjustment Board.

Id. at 27-28 (citations omitted). *See also Glover v. St. Louis-San Francisco Railway*, 393 U.S. 324, 329 (1969).

This case is a hybrid which fits neither of the above models, and it is not a case where the claims and prayers for relief against the Railroad and Union are so easily separable as to warrant bifurcating the proceedings—with the claim against the Railroad presented to the Board and the fair representation claim heard in federal court. Because reinstatement with seniority is sought, plaintiffs could not secure full relief in federal court if the Rail-

road were not a party.[2/] Furthermore, the alleged facts, viewed in a light most favorable to plaintiffs, are consistent with a pattern of collusion between Union and Railroad. The district court's concern about the duplication of effort and the possibly inconsistent results should two forums be required to interpret the contract is well-founded. Although the Supreme Court in *Czosek* did not decide whether "the employer may *always* be sued with the union when a single series of events gives rise to claims against the employer for breach of contract and against the union for breach of the duty of fair representation," 397 U.S. at 30 (emphasis added), the Court has explicitly permitted such suits in federal court and denied Board jurisdiction. This is the only resolution of that problem to receive Supreme Court approval. *See Glover v. St. Louis-San Francisco Railway,* 393 U.S. 324 (1969).

Unless *Union Pacific Railroad v. Sheehan,* 439 U.S. 89 (1978), has repudiated those portions of *Glover* and *Czosek* which discuss federal court jurisdiction of hybrid cases, we must find the district court's order of dismissal improper. In *Sheehan,* the Court determined that the Board has exclusive jurisdiction over minor disputes between employees and carriers. However, the Court did not discuss fair representation cases. As strong as the *Sheehan* Court's exclusivity language is, we find no authority to repudiate the equally strong language of *Czosek* and *Glover. See also Conley v. Gibson,* 355 U.S. 41, 44-45 (1957); *Steele v. Louisville & Nashville Railroad,* 323 U.S. 192 (1944). Absent statutory command, we are re-

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[2/] Indeed, the plaintiffs argue that they could not secure any relief if required to take their claims to the Board because the Union's actions here prevented the filing of a timely claim.

luctant to grant to the Board jurisdiction over fair representation cases and, absent clearer direction from the Supreme Court, we are unwilling to require bifurcated jurisdiction of hybrid cases.

We recognize that other circuits have created a form of pendent jurisdiction permitting the Board to hear fair representation cases that are intertwined with minor disputes. *See, e.g., Goclowski v. Penn Central Transportation Co.*, 571 F.2d 747, 755-56 (3d Cir. 1978). The district court here relied on *Goclowski* for the proposition that all disputes "which primarily [involve] contractual interpretation," *id.* at 756, require the "expertise of the Board in construing railroad labor contracts." *Id.* at 755. However appealing that proposition might be if we were writing on a *tabula rasa*, neither the statute nor the Supreme Court cases support it.[3/] In addition we hesitate to place on the district courts the perhaps impossible burden of determining at an initial stage of the proceeding, whether the ultimate resolution of the case will depend "primarily" on contract interpretation. We note that the complaint here charges Union officials with maliciously discriminatory behavior. *See, e.g.*, Record, vol. 1, at 9. This is sufficient to create a fair representation claim which may not depend primarily on the terms of the con-

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[3/] The Third Circuit believes that *"Glover* is not applicable when the basis of the claim is primarily construction and interpretation of existing collective bargaining agreements." 571 F.2d at 756 n. 13. Since few fair representation cases will not have elements of contractual interpretation, the danger of emasculating the mandates of *Glover* and *Czosek* is great. Even if the Board validly has jurisdiction in some fair representation cases, we note that the alleged facts here are strikingly similar to those of *Czosek*. There the jurisdictional issue was "beyond cavil." 397 U.S. at 28.

tract. *See Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 571 (1976); *Vaca v. Sipes*, 386 U.S. 171, 190 (1967); *Foust v. IBEW*, 572 F.2d 710, 715 (10th Cir. 1978).

No Supreme Court authority permits Board jurisdiction over a breach of fair representation claim. The dismissal of the claim against the Union is therefore reversed. Because we believe that *Sheehan* does not repudiate the doctrine of hybrid jurisdiction, the dismissal of the claim against the Railroad was also improper.

REVERSED AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH NORTHERN DIVISION

ORDER OF DISMISSAL

NC 77-0038

[Filed September 6, 1978]

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, STEVEN R. HYMUS,

Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY (PACIFIC LINES); BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES DEPARTMENT, AFL-CIO; LODGE #635, DOES 1 through 50, inclusive,

Defendants.

On July 26, 1978, defendants filed motions to dismiss or, alternatively, motions for summary judgment. On the same date plaintiffs filed a motion for summary judgment. The parties filed memoranda responding to these motions on August 7 and 9. In addition, the parties filed replies to these responsive memoranda on August 11 and 14.

This suit was brought by Clark Richins and six other individuals, all of whom were employees of defendant Southern Pacific Transportation Co. (Railroad) and members of defendant labor unions, Brotherhood of Railway Carmen and System Federation No. 114, Railway Employees Department, AFL-CIO. The gravamen of plaintiffs' claim against the Railroad is that they were furloughed on four occasions from 1972 through 1975 in violation of the collective bargaining agreement and subsequent amendments thereto. Plaintiffs' claim against the unions alleges that the unions breached their duty of fair representation by failing and refusing to protest plaintiffs' termination by the Railroad on the occasions mentioned above. The complaint prays for reinstatement of plaintiffs to their former positions with the seniority they would have had if never furloughed, lost wages and benefits, $5 million in punitive damages, attorneys' fees, costs of suit, and general damages.

Both the breach of contract claim against the Railroad and the unfair representation claim against the unions require interpretation of collective bargaining agreements between the defendants. Plaintiffs argue that their furloughs violated the 1965 Memorandum of Agreement, which governs relative seniority of carmen apprentices and carmen helpers. Defendants respond that certain railroad employees were given special job protection under a 1968 agreement referred to as the Ogden Union Railway & Depot Agreement and that this agreement modified seniority provisions of the 1965 Agreement. In addition, plaintiffs' claims require interpretation of Rule 38 of the Motive Power & Car Department's Agreement. This rule establishes procedures and time limits for the processing

of grievances. Since a substantial dispute exists as to whether plaintiffs complied with these rules and whether the rules should be applied literally or loosely, this portion of the collective bargaining agreement must be interpreted to resolve these issues.

All defendants have filed motions to dismiss for lack of jurisdiction on the grounds that plaintiffs failed to exhaust contractual and internal union remedies and the statutorily mandated administrative remedy of bringing their grievances before the National Railroad Adjustment Board. The Railway Labor Act provides:

> The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, . . . shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

45 U.S.C. § 153 First (i).

In *Andrews v. Louisville & Nashville R. Co.*, 406 U.S. 320 (1972), the Supreme Court held that this provision makes the administrative remedy exclusive in cases depending on the interpretation of the collective bargaining agreement (so-called "minor disputes"). Thus, the Court affirmed the dismissal of the employee's wrongful discharge claim due to his failure to exhaust administra-

tive remedies. The disposition of plaintiffs' claims in this case depends heavily on interpretation of the collective bargaining agreement. Since plaintiffs have completely failed to bring their grievances before the Board, this court has no jurisdiction over their claims against the Railroad. This is precisely the type of case in which federal courts are required to "defer to the expertise of the Board in construing railroad labor contracts." *Goclowski v. Penn Central Transp. Co.*, 571 F.2d 747, 755 (3rd Cir. 1977. 1978). Similarly, in *Harrison v. United Transp. Union*, 530 F.2d 558, 563 (4th Cir. 1975), *cert. denied*, 425 U.S. 958 (1976), the court held:

> Grievances founded upon contract claims must be presented to the Adjustment Board, and the only right of action in the district courts is for the enforcement of its awards. . . . But if the [employee's] loss results from the deliberately misleading conduct of the union, the union may be held to respond in compensatory damages to him, and there is no reason to stretch the statute to permit the employee's maintenance of an original cause of action against the railroad.

There are numerous other cases holding that a federal court has no jurisdiction over a "minor dispute" between a railroad and its employee until the employee has exhausted his remedies before the Board. *See, e.g., Conrad v. Delta Air Lines, Inc.*, 494 F.2d 914, 917 (7th Cir. 1974); *Smith v. Atlantic Coast Line R. Co.*, 421 F.2d 1400 (5th Cir. 1970); *Williams v. Texas International Airlines*, 435 F. Supp. 703 (S.D. Tex. 1977); *Sensabaugh v. Railway Express Agency, Inc.*, 348 F. Supp.

1398 (W.D. Va. 1972). Thus, the Railroad's motion to dismiss for lack of jurisdiction must be granted.

The question remains as to whether this court has jurisdiction over plaintiffs' unfair representation claim against the defendant labor unions. The statute quoted above does not literally require a dispute between an employee and his union to be presented to the Adjustment Board. However, the Supreme Court in *Conley v. Gibson*, 355 U.S. 41 (1957), held that federal courts have jurisdiction over unfair discrimination claims against unions even though the claims have not gone before the Board because the statute gives the Board no power to protect employees from discrimination by their unions. More recently, in *Jones v. Trans World Airlines, Inc.*, 495 F.2d 790, 796 (2nd Cir. 1974), it was held that "[a]n employee cannot prosecute a complaint against his collective bargaining agent by resorting to the remedies provided in section 3 of the Railway Labor Act."

In spite of the statute's language and judicial decisions such as *Conley* and *Jones*, it appears that the Board may adjudicate contract interpretation issues arising in certain unfair representation cases in which an employee proceeds against both his employer and his union. In *Goclowski v. Penn Central Transp. Co., supra*, the court held that a breach of contract claim against the railroad and a contractual impermissibility claim against both the railroad and the union required interpretation of the labor contract and therefore were for the Board to decide. Thus, the district court's dismissal of the latter claim against the railroad and the union for lack of jurisdiction was affirmed. The court explained:

> No doubt may be entertained that this claim requires close examination of the pertinent collective bargaining agreements between the Union and the Railroad. We defer to the expertise of the Board in construing railroad labor contracts. That the Union is joined as a defendant does not alter the basis of the claim which primarily involves contractual interpretation.

571 F.2d at 755-56 (citations omitted).

Similarly, in *Williams v. Texas International Airlines, supra,* an employee brought an employment discrimination suit against his employer and his union and an unfair representation claim against his union. The court held that

> before the plaintiff may bring his suit for unfair representation in federal court, he must first exhaust the administrative remedies provided in the Railway Labor Act. Then the suit may reach the federal courts which will hear the case on limited review. However, this court does not have jurisdiction to hear this charge of unfair representation at this time.

435 F. Supp. at 707. The same conclusion was reached in *Smith v. Atlantic Coast Line R. Co., supra,* and *Roberts v. Lehigh and New England R. Co.,* 323 F.2d 219 (3rd Cir. 1963). In *Roberts* the court held:

> [I]f the resolution of the differences between railroad employees, on one side, and the railroad and the unions, on the other, depends on the interpretation of disputed terms of the collective bargaining agreement, then the dispute must be sent to the National Railroad Adjustment Board, which has exclusive primary jurisdiction to make the interpretation.

Id. at 222. *Accord, Sensabaugh v. Railway Express Agency, Inc., supra.*

On the other hand, if an employee's claim is solely or primarily against his union, he has been permitted to proceed in federal court without first presenting his case to the Board. *E.g., Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 92-93 (3rd Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969); *Deboles v. Trans World Airlines, Inc.*, 350 F. Supp. 1274 (E.D. Pa. 1972). In those cases the employer was merely a nominal party who was joined to afford complete relief, and the cases only incidentally involved interpretation of collective bargaining agreements.

Turning to the present case, it is clear that this dispute directly and necessarily depends on an interpretation of the collective bargaining agreements between the Railroad and the unions. The issue of seniority requires contract interpretation. Even the procedural questions of timeliness and compliance with grievance procedures under Rule 38 of the Motive Power & Car Department's Agreement must be first submitted to the Board. *See Devita v. Burlington Northern, Inc.*, 494 F.2d 347 (9th Cir. 1974). The unfair representation claim requires a determination as to whether plaintiffs' grievances had any merit. This determination depends upon the interpretation of the collective bargaining agreement. The dispute here is not one primarily between the employees and their union. This is precisely the type of case that must be submitted to the Board before this court can have jurisdiction over the dispute.

A contrary decision would lead to undesirable results. Since it is clear that the claim against the Railroad

must be sent to the Board, permitting plaintiffs to pursue their unfair representation claim here would fracture this dispute into two cases: the Board hearing the claim against the Railroad and this court hearing the claim against the unions. This would require duplication of efforts and create a risk that the two forums would reach inconsistent interpretations of the contracts. Such inconsistent interpretations may place defendants in the untenable position of necessarily violating one rule while attempting to comply with the other.

For the reasons stated herein,

IT IS HEREBY ORDERED that plaintiffs' suit is dismissed, without prejudice, in its entirety, for lack of jurisdiction, on the grounds that plaintiffs have failed to exhaust their remedies before the National Railroad Adjustment Board.

In view of the court's determination that it lacks jurisdiction, all other motions pending in this case are mooted.

Dated this 6th day of September, 1978.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH NORTHERN DIVISION

ORDER DENYING REQUEST FOR RECONSIDERATION

NC 77-0038

[Filed October 16, 1978]

CLARK B. RICHINS, et al.,

Plaintiffs,

v.

SOUTHERN PACIFIC COMPANY (PACIFIC LINES), et al.,

Defendants.

On September 6, 1978, the court entered an order dismissing this action for lack of jurisdiction, plaintiffs having failed to exhaust their administrative remedies under the Railway Labor Act.

On September 19, plaintiffs filed a "Request for Reconsideration," asking the court to "retain jurisdiction over this matter while Plaintiffs bring this matter to the National Railroad Adjustment Board." On September 27, defendant Southern Pacific filed a reply urging the court to deny the request for reconsideration. Southern Pacific correctly argues that the court cannot retain jurisdiction that it does not possess.

IT IS THEREFORE ORDERED that plaintiffs' request for reconsideration is denied.

DATED this 14 day of October, 1978.

/s/ Aldon J. Anderson
ALDON J. ANDERSON
United States District Judge

Nos. 80-315, 80-392
IN THE

Supreme Court of the United States

October Term, 1980

SOUTH PACIFIC COMPANY,

Petitioner,

vs.

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, and STEVEN R. HYMUS,

Respondents.

BROTHERHOOD OF RAILWAY CARMEN OF THE UNITED STATES AND CANADA; SYSTEM FEDERATION NO. 114, RAILWAY EMPLOYEES' DEPARTMENT, AFL-CIO; LODGE #635,

Petitioners,

vs.

CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL, and STEVEN R. HYMUS,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

RESPONDENTS' BRIEF IN OPPOSITION.

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TABLE OF CONTENTS

	Page
Reasons Why Writ Should Be Denied	2
1. The Decision Below Is Not in Conflict With the Decisions of This Court	2
2. The Conflict in the Circuits Is Greatly Exaggerated or Non-Existent	4
3. The Decision of the National Railroad Adjustment Board Confirms the Correctness of the Tenth Circuit's Decision	5
Conclusion	6

INDEX TO APPENDICES

Appendix A. Order. Form 2(a) Award No. 8496, Docket No. 8220-I	App. p. 1
Appendix B. Award. Form 1. National Railroad Adjustment Board, Second Division. Award No. 8496, Docket No. 8220-I, 2-SPT-I-'80	2

TABLE OF AUTHORITIES

Cases — Page

Andrews v. Louisville and Nashville Railroad Co., 406 U.S. 320 (1972) 2, 3, 4

Czosek v. O'Mara, 397 U.S. 25 3

Glover v. St. Louis-San Francisco Railway Company, 393 U.S. 324 3

Goclowski v. Penn Central Transportation Company, 471 F.2d 747 (3rd Cir. 1977) 4

Hines v. Anchor Motor Freight, Inc., 424 U.S. 554 (19...) 3

Union Pacific Railroad Co. v. Scheehan, 439 U.S. 89 (1978) 2, 3, 4

United Steelworkers of America v. American Manufacturing Co., 363 U.S. 564 (1960) 2

United Steelworkers of America v. Enterprise Wheel and Car Corporation, 363 U.S. 563 (1960) 2

United Steelworkers of America v. Warrior and Gulf Navigation Company, 363 U.S. 574 (1960) 2

Vaca v. Sipes, 386 U.S. 171 (19...) 3

Statutes

United States Code, Title 29, Sec. 141 et seq. 2

United States Code, Title 45, Sec. 153 3

United States Code, Title 45, Sec. 184 3

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RESPONDENTS' BRIEF IN OPPOSITION.

Respondents CLARK B. RICHINS, BERNIE L. STARK, RALPH G. VICTOR, PAUL BENNETT, EARL F. DUSTIN, MIKE CLEM MERRILL and STEVEN R. HYMUS

respectfully request that this Court deny the Petition for Writ of Certiorari seeking review of the Tenth Circuit's opinion in this case. That opinion is reported at 620 F.2d 761.

Since the submission of these Petitions by Respondents here, the National Railroad Adjustment Board (Second Division) over objections by Respondents, as entered in Order and Opinion, Docket No. 8220-I, Award No. 8496, which is attached hereto as Appendix "A".

Reasons Why Writ Should Be Denied.

1. The Decision Below Is Not in Conflict With the Decisions of This Court.

In *Andrews v. Louisville and Nashville Railroad Co.*, 406 U.S. 320 (1972) and *Union Pacific Railroad Co. v. Sheehan*, 439 U.S. 89 (1978), this Court forcefully and clearly established that "minor" disputes under the Railway Labor Act should in general be resolved through the mechanisms established by collective bargaining agreements and by statute, and not by the Federal courts. But while of great significance in the context of the Railway Labor Act, these decisions merely brought Railway Labor Act practice into congruence with the practice under the Labor-Management Relations Act, 29 U.S.C. §141, *et seq.* ("LMRA"). Ever since the famous Steelworkers trilogy,[1] it has been well established that the proper form for the interpretation and application of collective bargaining agreements is in the grievance and arbitration machinery set up by those agreements. Now, since *Andrews* and *Sheehan*, that is also true under the Railway Labor Act. The only remaining distinction is that under the Railway Labor Act the establishment

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[1]The trilogy decisions are *United Steelworkers of America v. American Manufacturing Co.*, 363 U.S. 564 (1960), *United Steelworkers of America v. Warrior and Gulf Navigation Company*, 363 U.S. 574 (1960), and *United Steelworkers of America v. Enterprise Wheel and Car Corporation*, 363 U.S. 563 (1960).

of a grievance and arbitration mechanism is voluntary while under the Railway Labor Act, the National Railroad Adjustment Board is established by statute to resolve "minor" disputes. 45 U.S.C. §153.[2]

Despite the exclusivity in general of the arbitration tribunal under the LMRA, it is also well established that when a union has breached its duty of fair representations, the courts may have jurisdiction over both the claim against the union *and* the claim against the employer. *Cf. Vaca v. Sipes*, 386 U.S. 171 (19); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (19).

The decision of the Tenth Circuit in this case merely parallels the approach described in *Vaca* and *Hines* with regard to fair representation cases. The Tenth Circuit correctly pointed out that the exclusivity of the jurisdiction of the National Railroad Adjustment Board, as clearly stated in *Andrews* and *Sheehan*, must be reconciled with the equally important considerations forcefully stated by this Court in *Czosek v. O'Mara*, 397 U.S. 25 and *Glover v. St. Louis-San Francisco Railway Company*, 393 U.S. 324. The approach of the Tenth Circuit in reconciling *Andrews-Sheehan* and *Czosek-Glover*, merely establishes a procedure which is firmly entrenched in LMRA cases, *i.e.*, when there is an allegation of a breach of the duty of fair representation, a federal court may have jurisdiction over claims against both the union and the employer. There is nothing new or startling about this. It is the only possible reconciliation of the principle that contract questions be resolved by expert administrative bodies, and the principle that those bodies do not have jurisdiction over claims against unions by union members. To bifurcate the remedy, especially when there

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[2]*Cf.* also 45 U.S.C. §184 which requires that carriers by air and labor representatives establish arbitration panels.

is an allegation that the collective bargaining representative has abandoned the employee, would be in fact to deny any remedy to the employee.

Thus, this Court's decision in *Andrews* and *Sheehan* does not conflict with the decision of the Tenth Circuit. In fact, the decision below is an essential corollary of those decisions.

2. The Conflict in the Circuits Is Greatly Exaggerated or Non-Existent.

Defendants rely heavily on the case of *Goclowski v. Penn Central Transportation Company*, 471 F.2d 747 (3rd Cir. 1977) and point to that case as being in conflict with the Tenth Circuit's decision here. While there is some conflict in the dicta in the *Goclowski* opinion, it is important to note that in that case there was absolutely no allegation that the union's breach of duty of fair representation barred access to the NRAB. Plaintiffs in that case did not contend that they were not able to bring their claims to the NRAB; on the contrary, they appeared to have merely elected to go to the court rather than to the NRAB. The reason for this choice by Plaintiffs in *Goclowski* might have been the fact that the essence of their claim was an attack on the formation of the collective bargaining agreement. The correctness of that choice of forums was validated by the decision of the Third Circuit in that case which held that the NRAB did not have jurisdiction over the formation question. 571 F.2d 756.

Respondents point to no other conflicts in the Circuits in cases involving fair representation claims. This is hardly the kind of ambiguity in Circuit Court decisons which requires clarification by the Supreme Court at this time.

3. The Decision of the National Railroad Adjustment Board Confirms the Correctness of the Tenth Circuit's Decision.

Respondents allege in their complaint filed in the District Court that they had been demoted and furloughed in violation of a Memorandum of Agreement between the carrier and union and that these demotions and furloughs occurred on separate occasions in 1972, 1973, 1974 and 1975.

The collective bargaining agreement between the union and carrier requires that grievances be filed by employees within 60 days of the date of the incident grieved. Respondents alleged that they did not file a grievance with regard to the demotions and furloughs because the union had intentionally withheld from them the knowledge of the pertinent Memorandum of Agreement and that any grievance would clearly be untimely.

In 1975, Respondent Clark Richins discovered the existence of the Memorandum of Agreement and immediately filed a timely grievance as to his 1975 demotion and furlough. The other Respondents did not learn of the existence of the Memorandum of Agreement until at least 60 days after the last demotion and furlough.

After the decision of the District Court below, Respondents attempted to submit the matter to the NRAB in order to protect all possible legal remedies. However, after the entry of the Tenth Circuit's decision, the Respondents attempted to withdraw that submission. That body, however, entered a determination on November 19, 1980, holding that because Respondents Stark, Victor, Bennett, Dustin, Merrill and Hymus had joined Richins' claim, the NRAB lacked jurisdiction to consider all of the claims and was barred from rendering an award other than a dismissal. Of course, none of these individuals were able to submit a claim below because they only found out that they had rights under the collective bargaining agreement after the time

limits for the submission of a grievance had expired. Richins himself could not grieve several other furloughs that occurred before the furlough which was the subject of his claim which was later considered by the NRAB. Thus, the NRAB confirmed that after the time limits had expired and grievances could no longer have been submitted through the grievance and arbitration procedure below, it would not consider the claim later. Thus, unless a form existed for the resolution of this dispute, Respondents would be left without a remedy precisely because of the breach of duty of fair representation by the union.

Finally, the decision of the NRAB appears to recognize the validity of the contractual claims of Respondents. After stating that it had no jurisdiction to determine the issue, the NRAB gratuitously offered its opinion resolving Richins' claim on factual grounds, therefore implicitly accepting Respondents' contentions with regard to their rights under the Memorandum of Agreement and other applicable provisions of the collective bargaining agreement.

Conclusion.

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

JAY D. ROTH,
ROBERT A. BUSH,
Attorneys for Respondents.

Of Counsel:

TAYLOR & ROTH,
A Law Corporation,
By ROBERT A. BUSH

APPENDIX A.

Order.

Form 2(a).

National Railroad Adjustment Board, Second Division.

To accompany Award No. 8496, Docket No. 8220-I.

Mr. Robert A. Bush, Attorney, Taylor, Roth & Grant, 619 South Bonnie Brae Street, Los Angeles, California 90057.

The Division, after consideration of the Docket identified above, hereby orders that an award favorable to the petitioner should not be made. The claim is dismissed as set forth in the Award, a copy of which is attached and made a part of this Order.

Executive Secretary, National Railroad Adjustment Board, By Order of Second Division.

By/s/Rosemarie Brasch, Administrative Assistant.

Mr. L. M. Fox, Asst. Vice Pres., Labor Relations, Southern Pacific Trans. Co., One Market Plaza, San Francisco, California 94105.

Mr. O. W. Jacobson, Gen. Pres., BRCofUS&C, Carmen's Building, 4929 Main Street, Kansas City, Missouri 64112.

APPENDIX B.

Award.

Form 1.

National Railroad Adjustment Board, Second Division.

Award No. 8496, Docket No. 8220-I, 2-SPT-I-'80.

The Second Division consisted of the regular members and in addition Referee George E. Larney when award was rendered.

Parties to Dispute: Clark B. Richins, Bernie L. Stark, Ralph G. Victor, Paul Bennett, Earl F. Dustin, Mike Clem Merrill, Steven R. Hymus; Southern Pacific Transportation Company.

Dispute: Claim of Employees: This is an action brought by six (6) employees and former employees of the Southern Pacific Transportation Company (Pacific Lines) (hereinafter the "Company") who were members of the Brotherhood Railway Carmen of the United States of America, Systems Federation #114 of that Brotherhood, and Local 635 of the Brotherhood (hereinafter collectively referred to as the "Union"). Plaintiffs allege that they were demoted and then laid off in violation of the Collective Bargaining Agreement, specifically a 1965 Memorandum of Agreement which governed the relative seniority of employees classified as Apprentices and upgraded Apprentices and those employees classified as Helpers and upgraded Helpers.

Plaintiffs were first employed by the Company at various times during the year 1971 as Carmen Apprentices. Subsequently, they were all promoted to the job classification of upgraded Carmen Apprentice. Periodically from 1972 to the present they were demoted and furloughed before those employees with the job classification of upgraded Helper and Helper. Both upgraded Helpers and upgraded Apprentices perform the work of Journeymen Carmen while they

are in an upgraded status. After 1,040 days of indentureship, Apprentices obtain the job classification of Journeymen Carmen; Helpers can only count days toward obtaining a Journeymen Carmen date when they are working in an upgraded status. According to a 1965 Memorandum of Agreement between the Company and the Union, Upgraded Helpers should be demoted before Upgraded Apprentices are demoted. This was not the procedure followed by the Company and as a result of this breach of the Agreement, Plaintiffs were demoted and later furloughed and Helpers, who continued to work in an upgraded status, continued to accumulate credit toward their Carmen's date. None of the Plaintiffs were aware of the 1965 Memorandum of Agreement until after the last layoff in 1975. Throughout the period of time in question, Plaintiffs were told by Mr. Joyce Humphreys, Chairman of Local 635 of the Union, that the demotion and layoffs of the Apprentices ahead of the Helpers was the correct application of all Agreements then in effect. In response to inquiries about the furloughs by the Plaintiffs, Humphreys, and other Local Union officials, stated that the Helpers were protected and that any previous Agreements were superceded by the 1968 Reorganization Agreement.

The 1968 Reorganization Agreement governed certain of the terms and conditions of the merger of the Ogden Union Railroad & Depot Company (''OUR & D'') and the Southern Pacific (''SP''). The 1968 Agreement essentially merged the seniority rosters of the OUR & D and the SP and labelled all those who were employed by either Company before March 1, 1968 ''protected employees''. As ''protected employees'', they could only be furloughed as defined in that Agreement, at which time they would be compensated during the time of the furlough. The 1968 Agreement in no way modified the terms of the 1965 Mem-

orandum of Agreement and all members of the Union's Joint Protective Board, including General Chairman Harrold Carroll agree that the 1965 Memorandum of Agreement continued in effect after the 1968 Reorganization Agreement.

Finally, in early 1975, Mr. Clark Richins, one of the Plaintiffs, was told by Mr. Claire Toone, a former General Vice President of the Brotherhood, of the continued existence and viability of the 1965 Memorandum. At that time, Richins filed a grievance and pursued appeals through the International Union structure. The grievance was initially denied by the Company and the Union, through Harrold Carroll, who refused to process it any further, asserting that all Helpers had obtained a Carman's date by the time of the last layoff of Mr. Richins and therefore, since there were no more Helpers without Carmen's dates, the 1965 Memorandum of Agreement was of no relevance. The testimony of the Union officials, and the documents produced to date, demonstrate decisively that this was in fact not true and that the responsible Union officials were at least grossly negligent in not adequately investigating the matter and pursuing it.

On or about April 25, 1977, claimants here filed a lawsuit in the United States District Court for the District of Utah, Northern Division (Case No. 77-0038), alleging breach of the collective bargaining agreement by Defendant Railroad and breach of the duty of fair representation on the part of Defendant Union. Extensive discovery was taken on the part of both parties and much of that has been made part of the initial submission.

On September 6, 1978, the District Court Judge granted Defendants' motion for summary judgment, largely on the ground of the failure of Plaintiffs to bring the action before the National Railroad Adjustment Board. That ruling by the

District Court Judge is presently on appeal to the Tenth Circuit Court of Appeals.

Findings: The Second Division of the Adjustment Board, upon the whole record and all the evidence, finds that:

The carrier or carriers and the employe or employes involved in this dispute are respectively carrier and employe within the meaning of the Railway Labor Act as approved June 21, 1934.

This Division of the Adjustment Board has jurisdiction over the dispute involved herein.

Parties to said dispute waived right of appearance at hearing thereon.

Based upon a thorough review and analysis of the voluminous record before us, this Board has arrived at the following determinations:

1. The case as presented before us is so procedurally flawed as to cause us to dismiss the claim(s) without a consideration of the merits.
2. In conjunction with point 1 above, we note the claim now before us is at variance with the original claim initiated by Carman Clark Richins and handled on the local property. This variance arises as a result of Claimant Richins' attorney having amended the original claim while being progressed on appeal to the Board, by adding a number of other claimants identified as employees and former employees of the Carrier.

   It is well established principle on all Divisions of the National Railroad Adjustment Board that interjection of new evidence and argument, including the unilateral addition of any number of claimants to cases upon their appeal to the Board, causes the claim to be at

substantial variance from that which was handled on the property and clearly in violation of the Railway Labor Act as well as our Tribunal's own Circular No. 1. See for example, Third Division Awards, 11904, 13235, 13333, 13561, 14747, and 14854.

Thus, the Board lacks jurisdiction to consider these claims and is therefore barred from rendering an Award other than dismissal.

3. Finally, we feel compelled however to state for the record that were it possible for us to consider the merits of this claim, we would still move to dismiss the case based upon the evidence of record which reflects that Mr. Don R. Ward established seniority as a Carman on date of May 19, 1973. This fact, in and of itself is, we feel, dispositive of the entire issue in the original claim and therefore we conclude no contract violation obtained.

For all the foregoing reasons, we find the claim(s) improperly before us and also without merit.

AWARD.

Claim dismissed.

National Railroad Adjustment Board, By Order of Second Division

Attest: Executive Secretary, National Railroad Adjustment Board

By/s/Rosemarie Brasch — Administrative Assistant.

Dated at Chicago, Illinois, this 19th day of November, 1980.